In The

Supreme Court of the United States

October Term, 1977

No. 77-862

SOUTHERN IDAHO PIPE & STEEL CO.,

Plaintiff-Respondent,

vs.

CAL-CUT PIPE & SUPPLY, INC., dba
Western Pipe & Tube Co.,

Defendant-Appellant.

Appeal from the Supreme Court of the State Of Idaho

JURISDICTIONAL STATEMENT

WEBB, BURTON, CARLSON & PEDERSEN
LLOYD J. WEBB
P. O. Box 33
Twin Falls, Idaho 83301

JAMES J. MAY
Box 105
Twin Falls, Idaho 83301

Attorneys for Appellant

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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JURISDICTIONAL STATEMENT

The Appellant appeals from the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this proceeding as a Final Judgment on September 19, 1977. The Final Judgment of the Idaho Court affirmed a Judgment against the Appellant, a resident of the State of California, based upon jurisdiction achieved through personal service outside the State of Idaho. Appellant submits this Statement to show that the Supreme Court

of the United States has jurisdiction of the appeal and that a substantial question is presented.

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OPINION BELOW

The Opinion of the Supreme Court of the State of Idaho, is reported at 98 Idaho —, 567 P. 2d 1246 (1977). The Opinion of the Trial Court granting Judgment to the Respondent is unreported. Copies of the Opinion of the Trial Court and of the Opinion and Judgment of the Supreme Court of the State of Idaho are attached hereto as Exhibit "A".

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JURISDICTION

This appeal is taken to determine the validity of the exercise by the Idaho Courts of jurisdiction over the Appellant, which jurisdiction was attempted to be established pursuant to Idaho Code § 5-514 (a). The Appellant contends that the application of Idaho Code § 5-514 (a) and the exercise of jurisdiction over the Appellant herein by the Idaho Courts is without constitutional foundation and in violation of the Appellant's right to due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The original Opinion of the Supreme Court of the State of Idaho was entered on

June 21, 1977. Timely Petition for Rehearing was filed in the Supreme Court of the State of Idaho on July 14, 1977. Rehearing was denied and Final Judgment of the Supreme Court of the State of Idaho entered on September 19, 1977, and Notice of Appeal was filed in that court on October 27, 1977.

The jurisdiction of the Supreme Court to review the decision of the Idaho Court by direct appeal is conferred by Title 28, United States Code, § 1257 (2).

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STATUTES INVOLVED

Idaho Code § 5-514 (a) as is set forth in Appendix B hereto.

—o—

QUESTIONS PRESENTED

May the Idaho Court pursuant to Idaho Code § 5-514 (a) or otherwise, obtain jurisdiction over a non-resident corporation for the purpose of subjecting it to an in personam judgment when the only Idaho contact of the non-resident is by the circulation of a prospectus publication advising prospective purchasers that the non-resident corporation has steel pipe for sale and where after a call is received outside of the State inquiring about the purchase of the steel pipe the non-resident corporation sends a purchase order offer to sell the pipe, through the mails, to Idaho.

May that jurisdiction be exercised under the circumstances specified where delivery of the pipe is taken outside the State of Idaho by vehicles of the resident corporation traveling to the out of state situs, where payment is made to the non-resident corporation at an out of state situs, and where a dispute as to delivery or non-delivery arises out of the state.

May that jurisdiction be exercised under the circumstances of this case where the case involves a contract dispute as to the termination date of delivery of pipe.

STATEMENT OF THE CASE

I. The Background.

The parties are dealers in steel pipe. The plaintiff's place of business is in the State of Idaho. The defendant's place of business is in the State of California. In some years prior to the date of transactions in question, the plaintiff has purchased pipe from the defendant, sometimes on contacts initiated by the plaintiff and at other times on contacts initiated by the defendant.

At no time has the defendant maintained any office or any employees in the State of Idaho.

Prior to June 22, 1973, the defendant circulated a publication, amounting to a prospectus, to various pipe dealers in the western United States advising the pipe dealers that the defendant had available for sale 40,000 feet of 20 inch used steel pipe. The publication was received by the plaintiff at its office in Idaho on June 22, 1973.

After receiving the publication, the plaintiff's president called the defendant's president in California inquiring about the purchase of some of the advertised pipe, requesting a price quote and a statement of terms of purchase.

On August 7, 1973, the defendant mailed to the plaintiff, in response to the telephone conversations initiated by the plaintiff, a purchase order, which amounted to an offer to sell the pipe for delivery in California at a stated price and according to stated terms. With some modification of the offer, the plaintiff accepted and returned the signed purchase order to the defendant in California.

Thereafter the plaintiff, with its trucks, or trucks hired by it, took delivery of some 12,937.39 feet of steel pipe at the job site in California, picking up the first of the pipe on September 8, 1973, and the last of the pipe on October 5, 1973.

Later the parties were unable to agree as to the termination date of the delivery of the pipe and a dispute arose, the plaintiff contending that the defendant was obliged to deliver more pipe and the defendant contending that it was not obliged to deliver any more pipe.

An action was filed in the State of Idaho with personal service upon the defendant achieved only in the State of California.

At no time during any of the activities which were part of the transaction between the parties did the defendant or any of its representatives accomplish any ac-

tivity in the State of Idaho. At no time were any of the representatives of the defendant physically present in the State of Idaho. The only contact in the State of Idaho was the circulation of the prospectus to the plaintiff in the State of Idaho and the forwarding of the purchase order following the telephone call from the plaintiff in Idaho to the defendant in California.

II. The Primary Case Disposition.

The Trial Court in its decision determined that the jurisdiction did exist pursuant to Idaho Code § 5-514 (a). Amended Findings of Fact and Conclusions of Law to that effect were entered May 26, 1976, and Motion to Amend the Amended Findings of Fact and Conclusions of Law was denied by Order entered June 17, 1976.

Upon appeal, the Supreme Court of the State of Idaho concluded that jurisdiction did lie because of the method employed by the Appellant in the initiation of the sales transactions, the circulation of an "advertising circular" directed to the Respondent and to other prospective purchasers of steel pipe to be supplied by the Appellant.

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HOW THE FEDERAL QUESTIONS ARE PRESENTED

Throughout the procedure in the Distriet Court and in the Idaho Supreme Court, the Appellants have strenuously argued that jurisdiction over a non-resident corporation cannot be predicated upon Idaho Code § 5-514 (a) under the circumstances of this case. The jurisdictional questions were strenuously addressed to the Trial Court by Motion to Quash Summons, by Motion to Dismiss, and by argument in the final presentation of the case.

Those same questions were renewed upon appeal and preserved by assignment of error to the Idaho Supreme Court.

The contentions were considered by the Trial Court and by the Idaho Supreme Court and rejected by the Opinions here specified.

All of the documents in which the Federal Questions were presented are included in the certified copy of the record of the court below to be presented to this court and are illustrated in the Opinions of the Courts as set out in Appendix A hereto.

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THE QUESTIONS ARE SUBSTANTIAL

The Courts of the States and the Courts of the Circuits have taken varying positions as to jurisdiction and jurisdictional concepts have been advanced by some courts to the point where any vestige of territorial jurisdiction disappears. This is the situation in the State of Idaho by virtue of the decision of the Idaho Supreme Court here appealed.

The Idaho Supreme Court, purportedly following its own decisions in *Doggett v. Electronics Corp. of America*, 93 Idaho 26, 454 P. 2d 63 (1969) and *Intermountain Business Forms, Inc. v. Shepard Business Forms Co.*, 96 Idaho

538, 531 P. 2d 1183 (1975), found jurisdiction over the Appellant by virtue of Idaho Code § 5-514 (a) which purports to subject any person or corporation to the jurisdiction of the Idaho courts when that person or corporation does any act "for the purpose of realizing pecuniary benefit" within the State of Idaho. *Southern Idaho Pipe & Steel v. Cal-Cut Pipe,* 98 Idaho —, 567 P. 2d 1246 (1977). The Idaho Court in its opinion gave special attention to the decisions of the Illinois Courts and to the decision of the United States District Court for the Southern District of New York in *Fullmer v. Sloan's Sporting Goods Co.,* 277 F. Supp. 95 (1967). Interpreting the *Fullmer* case, the Idaho Court concluded that jurisdiction could be predicated upon the mere advertisement of an article for sale in a magazine which was circulated in Idaho, although in that particular case the defendant's goods were shipped to Idaho. The Idaho Court distinguishes its own decision in *Akichika v. Kellerher,* 96 Idaho 930, 539 P. 2d 283 (1975), where the contract of purchase was made after an Idaho resident read a classified advertisement in a newspaper published in Oregon and where the actual purchase of the article was accomplished in Oregon, a case which the dissenting Justice, in the decision below, finds indistinguishable from the fact situation in the present case.

There certainly has been a mammoth expansion of jurisdictional concepts in the past several years, probably nowhere as pronounced as in the State of Idaho. Nearly all of the recent decisions concerning jurisdiction gives some attention to the pronouncements of this court in *International Shoe Co. v. State of Washington Etc.,* 326 U. S. 310, 66 S. Ct. 154 (1945), *McGee v. International*

Life Insurance Company, 355 U. S. 220, 78 S. Ct. 199 (1957) and *Hanson v. Denckla,* 357 U. S. 235, 78 S. Ct. 1228 (1958). The distances that state courts have trod since *International Shoe Co.,* however, have been remarkable. It would certainly appear to be time to review just how far this expanding notion of jurisdiction will be allowed to go, consistent with the U. S. Constitution and basic concepts of state court jurisdiction over non-resident defendants.

Before the adoption of the Fourteenth Amendment, the prevailing rule was that an attempted exercise of jurisdiction over a person outside the state of the forum was a nullity. *Hanson v. Denckla,* supra, U. S., p. 249, S. Ct. p. 1237. In *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565 (1878), it was determined that even after the adoption of the Amendment, a judgment purporting to bind the person of a defendant over whom the court had not acquired in personam jurisdiction was void within the forum state and outside the forum state.

In *International Shoe Co.,* supra, the question of jurisdiction was equated with flexible concepts of due process as they related to the question of whether or not the foreign defendant should be required to respond to the jurisdiction of the courts of the forum state. There the corporation questioning the jurisdiction of the Washington courts had 11 to 13 salesmen employed in the State of Washington with their principal activities there centered. These salesmen were compensated for their sales made in the State of Washington with annual commissions of over $31,000. They were furnished with supplies shipped to them in the State of Washington and

they rented rooms at the corporation's expense in the State of Washington for the purpose of displaying the company's goods.

Concluding that the courts of the State of Washington did indeed have jurisdiction, this court, speaking through Justice Stone, found that concepts of due process determinative of the question of jurisdiction required only when the defendant sought to be brought before the courts of the forum:

> ". . . have certain minimum contacts with it (the forum) such that the maintenance of the suit does not offend 'traditional notices of fair play and substantial justice'." *Id.*, 316 (U. S.), 158 (S. Ct.).

As to the somewhat metaphysical notion of "presence" within the forum state, Justice Stone indicated the concept of "presence" was a fiction which really begged the basic question, but that "presence" is not doubted when the activities of the corporation within the forum state:

> ". . . have not only been continuous and systematic, but also give rise to the liabilities sued on . . ."

Justice Stone noted that the casual presence of a corporate agent in the forum state or the transaction of a single or isolated activity was not enough to subject the corporation to suit on causes unconnected with the activity.

What the court, in *International Shoe Co.*, seems to do is to basically equate due process and fundamental fairness with jurisdiction. This is the language of the court at p. 319 (U. S.), 160 (S. Ct.):

> "Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation

> to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

The court goes on to state that the clause did not contemplate the exercise of jurisdiction over a defendant ". . . with which the state has no contacts, ties, or relations."

Finally, Justice Stone introduces the concept of a corporate defendant "enjoying" the benefits and protection of the laws of the forum and thusly exposing itself to the obligations impressed by the forum including the duty to respond to a suit in the forum.

The court ultimately concluded (at p. 320 (US) 160 (S. Ct.)) that International Shoe's activities constituted " . . . systematic and continuous (activity) throughout the years in question . . . " illustrated by its large volume of business and its significant receipt of benefit from the laws of the forum state. This, according to Justice Stone, operates to:

> " . . . establish sufficient contacts or ties . . . to make it reasonable and just according to our traditional concepts of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there."

International Shoe seems to leave us with a flexible standard of jurisdiction couched in terms of due process and fair play related to the involvement of the non-resident defendant in activities within the forum state, which activities would cause a reviewing court to believe that the non-resident had the benefit of the governmental services of the forum state and could hardly complain if some corollary responsibilities, such as having to defend a law suit, went with the benefits. The *International Shoe* formula, if

such can be found, seems to be one of flexibility, demanding a case by case situation review.

In *McGee v. International Life Insurance Company*, supra, most commentators saw an expansion of the *International Shoe* doctrine which was really not warranted by the facts of the case. In an opinion of the court written by Justice Black and announced by Justice Douglas, these two pronouncements were made (at p. 222 (US), 201 (S. Ct.)):

> 1. ". . . 'due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." '"
>
> 2. "Looking back over this long history of litigation a trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents."

The real key to the *McGee* decision, however, seems to be found rather in the pronouncement of the court which relates to the subject of soliciting and maintaining insurance coverage in the forum state. This is the language of the court at p. 223 (US) 201 (S. Ct.):

> "The contract (of insurance) was delivered in California (the forum state) the premiums were mailed from there and the insured was a resident of that state when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable."

If the commentators believed that *International Shoe's* flexible rule was expanded in *McGee* to the point that traditional concepts of jurisdiction which were sounded in territory and power were eliminated the commentators were clearly disabused of this apprehension in *Hanson v. Denckla*. There a Pennsylvania trustee, of a trust established by a settlor then resident in Pennsylvania who had removed to Florida and who had transacted some considerable business with the trustee after the removal and prior to the settlor's death in Florida, was sought to be subjected to the jurisdiction of the Florida Court. This Court refused to find jurisdictional basis and determined that there was no jurisdiction in the Florida Court to subject the Pennsylvania trustee to its judgments.

The court recognized the evolution of the *Pennoyer v. Neff* doctrine to the "flexible standard" of *International Shoe* (*Id.*, p. 251 (US) 1258 (S. Ct.)) but went on to rule:

> ". . . but it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."

Further:

> "Those restrictions are more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of the territorial limits of the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimal contacts' with that State that are a prerequisite to the exercise of power over him."

For part of this proposition, the Court cites *Vanderbilt v. Vanderbilt*, 354 U. S. 416, 418, 77 S. Ct. 1360, 1362 (1957).

Distinguishing the *Hanson v. Denckla* situation from *McGee v. International Life Insurance Company*, the court reasoned at p. 252 (US) 1239 (S. Ct.):

> "Noting the interest California has in providing effective redress for its residents when non-resident insurers refuse to pay claims on insurance they have solicited in that state, the court upheld jurisdiction because the suit 'was based on a contract which had substantial connections with that state'."

The court noted that California had a specific statute designed especially to exercise California's "manifest interest" in providing effective redress for its citizens who had been injured by non-residents engaged in an activity that the State treats as exceptional and subjects to special regulation.

The court made it clear that jurisdiction should not be predicated upon:

> "The unilateral activity of those who claim some relationship with the non-resident defendant." (p. 253 (US) 1239 (S. Ct.)).

The court made it clear that there must be some act on behalf of the non-resident which can be interpreted as being purposefully made, causing the inception of the forum State's jurisdiction. This is the language of the court at p. 253 (US) 1240 (S. Ct.):

> ". . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."

This definition of jurisdiction has not been retreated from by this Court. In *Nebraska Press Association v. Stuart*, 96 S. Ct. 2791, 2806 (1976) this statement was made:

> "The territorial jurisdiction of the issuing court (as to an injunction) is limited by concepts of sovereignty. . . ."

The Idaho Court, however, predicates jurisdiction upon the mere fact that the defendants herein circulated a prospectus which reached the State of Idaho and which stated that it had available for purchase, upon negotiation, steel pipe. This they do despite the fact that the initiation of the purchase discussions was by an Idaho resident calling the defendant in California. While it is true that the defendant responded to the Idaho initiated calls by sending a purchase order with terms of purchase in the interstate mails to Idaho, the pipe which was the subject of the transaction was situated in California, delivery was taken in California by the Idaho based plaintiff and the California company maintained no personnel in Idaho, and no contacts whatever with Idaho other than the mere circulation of the prospectus and the mailing of the purchase order to Idaho.

It cannot be seen where Idaho has any "manifest interest" in protecting its citizens who choose to deal with California companies, buy California situated materials, take delivery thereof in California, and make payment to California. The apparent basis of the decision below is that when anyone solicits business (presumably through a magazine article, a newspaper article, or otherwise) through the mails, and that solicitation publication happens to come to Idaho, and it happens that that solicitation is acted upon by an Idaho resident, then the Idaho Courts obtain jurisdiction. This would seem to be wholly un-

warranted even by the *International Shoe* doctrine of flexibility but certainly by the determinations of this court in *Hanson v. Denckla.*

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CONCLUSION

Because of the conflict in the states and between the circuits and because it is believed by the Appellant that the decision of the Idaho Court totally eliminates any concept of territorial jurisdiction in the imposition of Idaho Judgments upon non-resident corporations, the Appellant respectfully requests that this Court grant jurisdiction of this appeal for plenary consideration with briefs on merits and with oral argument.

Respectfully submitted,

WEBB, BURTON, CARLSON & PEDERSEN
By LLOYD J. WEBB

P. O. Box 33
Twin Falls, Idaho 83301

JAMES J. MAY

Box 105
Twin Falls, Idaho 83301

Attorneys for Appellant

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12345

Twin Falls, April Term, 1977

SOUTHERN IDAHO PIPE & STEEL CO.,
Plaintiff-Respondent,

vs.

CAL-CUT PIPE & SUPPLY, INC. dba WESTERN PIPE & TUBE CO.,
Defendant-Appellant.

Filed: June 29, 1977
R. H. Young, Clerk

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. Theron W. Ward, District Judge.

Appeal from district court judgment awarding damages for breach of contract. *Affirmed.*

Lloyd J. Webb, of Webb, Burton, Carlson & Pedersen, Twin Falls, for appellant.

John Hepworth, of Hepworth, Nungester, Felton & Hart, Buhl, for respondent.

DONALDSON, J.

This case involves a contract action under the Uniform Commercial Code. Appellant Cal-Cut Pipe & Supply, Inc. (hereinafter referred to as Cal-Cut) is a California based corporation dealing in used steel pipe. It

has operated in the State of Idaho for a number of years. It is undisputed that respondent Southern Idaho Pipe & Steel Co. has dealt with Cal-Cut for the last ten years. Cal-Cut does not maintain sales offices or agents in the state, however. Its method of operation is to advertise in Idaho by mail or telephone. Deliveries are made in California as are the contracts of sale. The buyer is responsible for transporting the steel pipe.

On June 23, 1973, Southern Idaho received in the mail a publication advising that Cal-Cut wished to negotiate the sale of used steel pipe under specified terms. Several phone conversations ensued culminating in Cal-Cut's making of a formal written offer to sell to Southern Idaho. This occurred on August 7, 1973. The offer was accepted by mail, but Southern Idaho changed the final delivery date from October 15, 1973 to December 15, 1973. Southern Idaho enclosed a $20,000 check along with its acceptance, which check was deposited in Cal-Cut's bank account. It is disputed by the parties whether the change in the delivery date was discussed in subsequent communications. But both parties agree that they negotiated a change in the minimum amount of steel pipe that had to be sold to Southern Idaho from 40,000 to 30,000 feet. On August 20, 1973, Cal-Cut sent the written confirmation to Southern Idaho. The confirmation included the changed minimum requirement of 30,000 feet of steel and the *original* final delivery date of October 15. At the bottom of this confirmation was the postscript, "We will work it out." Southern Idaho did take delivery of 12,937 feet of pipe in California between September 8, 1973 and October 5, 1973.

Sometime in October, Cal-Cut refused to make any more pipe available. The parties disagreed as to when this occurred. Cal-Cut said it was October 17, 1973, Southern Idaho maintains that it was around the first of October and that the reason given by Cal-Cut was that the sale was not profitable. It is undisputed that the supply of steel pipe was in short supply and that market prices rose sharply during the latter part of 1973 and during 1974.

The threshold issue on appeal is whether the district court had in personam jurisdiction over Cal-Cut under Idaho's long-arm statute. The issue in its simplest form is whether the solicitation of sales via the mail and telephone qualifies as the "transaction of business" under I. C. § 5-514.

Idaho Code § 5-514, in relevant part, reads as follows:

> "Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of the state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state which is hereby defined as the *doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation.*" (Emphasis added.)

The language of I. C. § 5-514(a) is broad. It is designed to provide a forum for in-state residents in a world of increasingly complex commercial transactions. The statute is remedial in nature and should be broadly construed. Doggett v. Electronics Corp. of America, 93 Idaho 26, 454 P. 2d 63 (1969).

Viewing the statute from this perspective it is impossible to avoid the conclusion that Cal-Cut's activities in the State of Idaho constitute the "transaction of business" within the meaning of I. C. § 5-514(a). It is true that Cal-Cut does not operate a sales office and did not maintain sales agents in Idaho. The fact that a party being sued does not have physical presence in Idaho, however, does not render I. C. § 5-514(a) inapplicable. Intermountain Business Forms, Inc. v. Shepard Business Forms Co., 96 Idaho 538, 531 P. 2d 1183 (1975). This Court has said in the past that by enacting the statute in question the legislature intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution. Doggett v. Electronics Corp. of America, *supra,* at 30. In modern times that jurisdiction has been expanded to cover contacts with a state that fall far short of a physical presence.

Cal-Cut has entered into commercial transactions with Southern Idaho Pipe & Steel Co. for the last ten years. The trial court also found that Cal-Cut has contracted with other Idaho based corporations for the sale of steel pipe. Cal-Cut compensates for its lack of sales personnel in Idaho by sending advertising circulars directly to potential buyers notifying them of the availability of steel pipe and announcing the terms of the sale. Follow-up communications are then made by telephone and mail to finalize transactions with interested buyers.

The salient feature of this modus operandi for jurisdictional purposes is that Cal-Cut initiates the sales transactions. The present controversy began when Cal-Cut mailed one of its advertising circulars directly to Southern Idaho Pipe and Steel. This method of operation unambiguously qualifies as the "doing of an act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish" its business purposes in the State of Idaho.

Such an interpretation is consistent with prior cases that have interpreted I. C. § 5-514 (a) and the Illinois long-arm statute after which the Idaho statute is modeled.

The decision of this Court that is most directly on point is Intermountain Business Forms, Inc. v. Shepard Business Forms Co., *supra.* Suit in that case was initiated by Intermountain Business Forms, an Idaho corporation, against a defendant whose principal place of business was Portland, Oregon. Intermountain had sent a written order to defendant for certain business forms which were to be shipped directly to Intermountain's customer in Caldwell, Idaho. The goods were allegedly non-conforming and defective so Intermountain revoked its acceptance. Defendant challenged the jurisdiction of the district court's alleging that it had no place of business in Idaho or sales representatives traveling in Idaho, and further that all business transactions with any residents of Idaho resulted from requests made to defendant at its place of business in Oregon. In upholding the district court's assumption of jurisdiction, this Court highlighted the following Idaho contacts: defendant had had a sales repre-

sentative operating in Idaho twelve years prior to the time of suit, defendant had placed a listing of its company name in the Boise City telephone directory, the president of the defendant company had made several trips to Boise on company business, and that defendant had solicited business in Idaho for fifteen years. To this compilation the district court could have added that delivery of the goods took place in Idaho.

Remembering the admonition of *Intermountain* that "each case must be considered in light of its particular jurisdiction facts" and comparing the Idaho contacts in *Intermountain* with those in the present case, we are unable to conclude that they differ enough to warrant a contrary result. The only significant contact in *Intermountain* was defendant's solicitation of business in Idaho for fifteen years. Cal-Cut has likewise solicited business in Idaho for a substantial period of time, actively initiating its sales transactions with residents of this state. We think this contact with the Idaho forum is sufficient for Cal-Cut to qualify as transacting business within the meaning of the statute. The fact that Southern Idaho received the steel pipe in California is not dispositive.

The fact situation in *Intermountain* and in the case at bar should be distinguished from Akichika v. Kellerher, 96 Idaho 930, 539 P. 2d 283 (1975), cited in Cal-Cut's brief. In that case, this Court held that the non-resident defendant was not transacting business in I d a h o when he sold a used truck to an Idaho resident. The contract of purchase was made after the Idaho resident read a classified advertisement in the Portland Oregonian, a newspaper having a circulation primarily in Oregon. He

then journeyed to Portland, Oregon, where he entered into the contract of sale. The defendant's activities were not geared to an Idaho clientele, the sale to an Idaho resident occurred fortuitously.

The United States Federal District Court for the Southern District of New York had an opportunity to interpret Idaho's long-arm statute in a diversity action initiated by an Idaho citizen against a New York distributor of guns and ammunition. Fullmer v. Sloan's Sporting Goods Co., 277 F. Supp. 995 (1967). Defendant advertised its products in a magazine of national circulation and sold its products to out-of-state customers by mail order. In holding that the defendant was subject to the jurisdiction of Idaho, the court stated:

> "In advertising its products in magazines of national circulation, which led to the sale here involved, defendant was doing an act for the purpose of realizing pecuniary benefit or attempting to accomplish its business purposes in the State of Idaho, which was sufficient to subject defendant to jurisdiction in Idaho under subdivision (a) of Section 5-514 of the Idaho Code." 277 F. Supp. at 997.

Note that the court predicated jurisdiction on the fact that defendant advertised in magazines that enjoyed an Idaho circulation and could be expected to reach Idaho clientele. The Court could have added that defendant also shipped its wares directly to Idaho customers, but it did not. Apparently the court felt that the mere solicitation of customers in a magazine of national circulation was sufficient to constitute doing business in Idaho within the meaning of I. C. § 5-514 (a).

Idaho's long-arm statute was patterned after that of Illinois. This Court has held that the decisions of Illinois

may be looked to for persuasive guidance. Intermountain Business Forms, Inc. v. Shepard Business Forms Co., *supra*. The most recent decisions by the Illinois Appellate Court are consistent with the decision we reach today.

In Cook Associates v. Colonial Broach & Mach. Co., 304 N. E. 2d 27 (Ill. App. 1973), plaintiff, an Illinois employment agency, had sent a prospectus listing available job applicants to defendant, a Deleware corporation doing business in Michigan. In response to the prospectus, defendant telephoned plaintiff requesting that plaintiff divulge the name of an applicant whose partial identification had been gleaned from the prospectus. The applicant was a Wisconsin resident. Defendant agreed to pay plaintiff's placement fee if the applicant was subsequently hired. When defendant declined to pay this fee, plaintiff filed suit in Illinois. In response to defendant's contention that Illinois lacked jurisdiction, the Illinois Appellate Court held that defendant's single telephone call made in response to plaintiff's prospectus constituted a sufficient contact with the state to confer jurisdiction on Illinois courts. The court reasoned that:

> "Although defendant's only contact within this state was a telephone call, that call was all that was necessary for defendant to achieve its purpose • • • defendant knew, or should have known, that it had entered into a contract with an Illinois agency, that the agency would perform its services from its office in Illinois, that the fee, if due, would be paid to plaintiff in Illinois, and, if the fee were not paid as promised, defendant might be liable to suit in the Illinois courts." 304 N. E. 2d at 31.

The Illinois Court of Appeals endorsed *Cook Associates* in Colony Press, Inc. v. Fleeman, 308 N. E. 2d 78 (Ill. App.

1974). *Colony Press* involved a defendant Ohio company which had ordered and received from plaintiff, an Illinois corporation, printed advertisements to be used as inserts in an Ohio newspaper. As was the case in *Cook Associates*, plaintiff made the initial business contact by sending defendant a flyer advertising its wares. Defendant responded by placing an order via the telephone. The Illinois Appellate Court held that this limited contact within the Illinois forum constituted the transaction of business within the meaning of the Illinois statute.

Both cases find jurisdiction in circumstances that manifest a less substantial connection between the non-resident defendant and the forum state than that found in the present case. Both cases predicate jurisdiction on a single transaction, consummated after the non-resident defendant was initially contacted by the resident plaintiff. In the case at bar we have a series of transactions not only with the plaintiff but with other Idaho residents that were initiated by the non-resident defendant.

Jurisdiction is predicated on the power of a court to exercise its authority over a party. Restrictions on in personam jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with that state that are prerequisite to its exercise of power over him.

Unless a defendant has those contacts, any judgment purporting to bind him violates the due process clause of

the Fourteenth Amendment. As the Supreme Court stated in International Shoe Co. v. Washington, 326 U. S. 310 (1945):

> "due process requires * * * that in order to subject a defendant to judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U. S. at 316.

In Hanson v. Denckla, 357 U. S. 235 (1958), the Court concluded that the minimum contacts requirement of *International Shoe* had not been met. The case involved the attempt by a Florida court to obtain in personam jurisdiction over a Delaware trustee who had been administering a trust created by the testatrix, then residing in Florida, when she was domiciled in Pennsylvania. Notwithstanding the considerable business correspondence which flowed between the testatrix and the trustee the court held the contacts were insufficient to satisfy due process requirements.

Cal-Cut relies on this case to support its argument that its contacts with Idaho do not meet the "minimum contacts" standard of *International Shoe*. Nothing in *Hanson* purports to override the earlier case of McGee v. International Life Insurance Co., 355 U. S. 220 (1974), however. There the Supreme Court validation of California's assumption of jurisdiction over a Texas defendant whose only contact with the state as far as the record shows was the issuance of a life insurance policy to a California resident. The case arose when the defendant insurance company refused payment on the insurance policy on the ground that the deceased committed suicide. The beneficiary of the policy sued in a California court, serving the defendant by registered mail pursuant to a California statute. The plaintiff recovered a judgment which the defendant attacked on due process grounds. In upholding the in personam jurisdiction of the California courts, the United States Supreme Court delineated the following California contacts: the policy was delivered in California, the premiums were mailed from there, the deceased was a California resident as was the plaintiff, the witnesses on the suicide issue resided there, and California had an interest in providing effective means of redress for its citizens.

On a purely quantitative basis the contacts in *Hanson* may have been as great as those in *McGee*. The crucial distinction between the two cases seems to be that in *McGee* the contacts, such as they were, were initiated by the defendant where as in *Hanson* they were not.

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each one that there be some act by which defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*" Hanson v. Denckla, supra at 253. (Emphasis added.)

We believe that Cal-Cut's initiation of business activity in Idaho is crucial to the resolution of the constitutional question. Unilateral activity usually will not be sufficient to establish the "minimal contacts" with the forum state envisioned by *International Shoe*, but when a nonresident defendant initiates contact with residents of the forum state and those contacts proceed, we think that the constitutional standard of *International Shoe* is satisfied. Cal-Cut has

transacted business in Idaho for several years, business that was initiated directly by Cal-Cut, its customers receiving personalized invitations to purchase its wares. Under such circumstances, Cal-Cut cannot deny that it has a sufficient nexus with the state to allow the state's citizens an effective means of legal redress.

Having resolved the threshold issue of jurisdiction, we now proceed to the question of whether the sales forms exchanged between the two parties resulted in a binding contract. The transaction in question involved a sale of goods as defined in I. C. § 28-2-1005 so it is within the scope of the Uniform Commercial Code. I. C. § 28-2-102. The relevant code section that determines the validity of an acceptance when it includes different or additional terms is I. C. § 28-2-207. It reads as follows:

"Additional terms in acceptance or confirmation.—(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of a contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a

contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act."

Section 28-2-207 of the Uniform Commercial Code was designed primarily to render equity in cases where an acceptance added additional or different terms and performance had not yet begun. At common law an acceptance had to mirror an offer; an ostensible acceptance that contained even a frivolous variation from the original terms of an offer was construed as a counteroffer. The draftsmen of § 28-2-207 had cases like Poll v. Brunswick Balke-Collender Co., 110 N. E. 619 (N. Y. 1915) in mind.

In most sales transactions the sales contract is not bargained for in the usual meaning of the term. In lieu of comprehensive bargaining, the seller and the buyer exchange form contracts, each prepared by the party's respective counsel and each drafted to give advantage to its holder. The end result is that the two sets of forms usually diverge.

The parties to the transaction in *Brunswick* followed this procedure. The seller initiated the transaction sending the buyer an offer. The buyer sent back its own order form which happened to coincide with that of the seller except in one minor respect——it added "The acceptance of this offer you must in any event promptly acknowledge." The seller failed to acknowledge and the buyer for independent business reasons backed out of the contract. When the seller sued the buyer, the court, following the traditional common-law approach, held that the buyer's order form

did not constitute an acceptance, but was a counteroffer; a contract never came into being and the seller had no remedy. Section 28-2-207 changes the results in cases such as these. Its net effect is to lock the welsher into the contract; it rejects the common-law mirror image rule and converts the common-law counteroffer into an acceptance.

In this context, the dictates of § 28-2-207 are unambiguous. Unfortunately, the far more typical situation which courts have had to deal with is a dispute as to the terms of a contract which arises after the parties exchange documents, perform, or start to perform. Section 28-2-207 is less suited to this terrain. As one commentator has stated it,

> "This is not only a different but also a more difficult problem for the law than that of keeping the welsher in. The law as to terms must be sophisticated enough to nullify the efforts of fine-print lawyers, it must be sufficiently reliance-oriented to protect the legitimate expectations of the parties, and it must be fair and evenhanded." J. White and R. Summers, Uniform Commercial Code § 1-2 (1972).

Insofar as Section 28-2-207 was drafted primarily to create a contract where one did not exist under the common law, it does not furnish unambiguous answers to the varied problems that emerge when the legal dispute arises as to the terms of a contract after performance has begun.

In the present case, we have an acceptance that contains not additional terms, but contradictory terms. Southern Idaho in its acceptance changed the delivery date from October 15, 1975, to December 15, 1975. We also have partial performance of the contract.

The presence of contradictory terms does not present a problem as to the validity of the acceptance. The Uniform Commercial Code clearly envisions that a contract came into being under the facts of this case. Section 28-2-207 (1) provides that a "definite and seasonable expression of acceptance • • • operates as an acceptance even though it states terms *additional to or different* from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." (Emphasis added.)

Although it is conceivable that a purported acceptance can be so different from the terms of an offer that it would not create a binding contract,[1] we do not believe that the acceptance in the case at bar diverged so radically from the terms of the offer to warrant this result. There are several indications in the record that the altered final delivery date did not constitute a radical change. Cal-Cut apparently acquiesced in the new delivery date when it added the postscript "we will work it out" to the confirmation form and when it began performance. In fact, Archie Langdon, president of Southern Idaho, testified that Cal-Cut orally agreed to the final delivery date. Cal-Cut also failed to establish the urgency of the October

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1 Section 28-2-204 of the Uniform Commercial Code establishes the general proposition that a "contract for the sale of goods may be made in any manner sufficient to show agreement." A purported acceptance that differs radically from the terms of an offer arguably does not manifest sufficient agreement to the offer to create a contractual obligation. Given the language and history of the Uniform Commercial Code this would be the exception, however. A document can qualify as an acceptance under § 2-207 (1) and yet differ substantially from the offer. J. White and R. Summers, Uniform Commercial Code § 1-2 (1969).

15th as opposed to December 15th final delivery date. We therefore hold that Southern Idaho's response to Cal-Cut's offer created a binding contractual relationship between the parties.

The Uniform Commercial Code establishes the existence of a contract, but what terms it embodies is problematic.[2] Section 207 (2) provides guidelines for the incorporation of additional terms, but it is silent as to the reconciliation of different terms. Section 207 (3) states that the "terms of a particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act," but it applies only to contracts that are actualized by the conduct of the parties in the absence of a written agreement. Here, we have already held that the written communications of the parties establish a contract.

Cal-Cut makes the argument that since its document was the offer, Southern Idaho's expression of acceptance was an acceptance of all the terms on this form, including the October 15th delivery date. Under this argument, the first party to a sales transaction will always get his own terms. In most commercial transactions, which party processes its form first is purely fortuitous. To allow

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2 Cal-Cut's offer allowed an October 15, 1975 final delivery date while Southern Idaho's acceptance set the final delivery date as December 15, 1975. What the final delivery date was is significant not only because of its bearing on damages, but also because it is relevant to the issue of breach. The record contains contradictory evidence as to when Cal-Cut ceased deliveries. Cal-Cut contends that it was October 17, 1973, while Southern Idaho sets the date as October 1, 1973.

the contents of a contract to be determined on this basis runs contrary to the underlying purposes of the Uniform Commercial Code of modernizing the law governing commercial transactions. I. C. § 28-1-102. We cannot accept such an arbitrary solution.

Nor can we accept the solution offered in Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F. 2d 497 (1st Cir. 1962). In that case the buyer sent a purchase order to the seller for a quantity of cellophane adhesive manufactured by the latter. Subsequently the seller returned an acknowledgement that contained a disclaimer of all warranties on the products. The buyer was silent as to the disclaimer; he neither assented nor objected to it. The emulsion was shipped thereafter and was received and paid for by the buyer. The problem arose when the emulsion failed to adhere and the buyer instituted an action for damages. The First Circuit Court held that a responding document "which states a condition materially altering the obligation solely to the disadvantage of the offeror" was "expressly conditional" within the meaning of § 2-207 (1).[3] The seller's supposed acceptance was therefore a counteroffer which was accepted when the buyer received and used the goods.

Under this approach, the party who fortuitously sends the responding form, will get all of his terms. *Roto-Lith* also undermines the purposes of § 28-2-207 (1) in that it effectively reinstates the common law mirror image rule

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3 Idaho Code § 28-2-207 (1) provides that a responding document containing additional or different terms operates as an acceptance unless the "acceptance is expressly made conditional on assent to the additional or different terms."

whenever, as would usually be the case, a responding document states a condition solely advantagous to the party proposing it.[4]

The solution we choose to adopt is one suggested by Comment 6 to § 28-2-207.

> "6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2)."

We acknowledge that this comment is confusing in that it refers both to conflicting terms and to § 28-2-207 (2) which deals exclusively with additional terms. We believe, however, that the draftsmen of the Uniform Commercial Code must have intended Comment 6 to be relevant to the resolution of the present controversy. Section 28-2-207 (1) allows a responding document containing different terms to function as an acceptance, but except for Comment 6 nothing in the Uniform Commercial Code broaches the subject of how the conflicting terms are to be incorporated into one contract. Section 28-2-

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4 *Roto-Lith* involved a responding document that contained an additional term, but its reasoning would be equally applicable to a response containing different terms. We reject it in both cases.

207 (2) details under what circumstances additional terms are incorporated into a contract. Section 28-2-207 (3) determines the contents of a contract formed by conduct evidencing a contract. Comment 6 is the only explanation the draftsmen provide for the problem of conflicting terms. We hold on its authority that where a contract is formed by conflicting documents, the conflicting terms cancel out. The contract then consists of the terms that both parties expressly agree to with the contested terms being supplied by other sections of the Uniform Commercial Code.

Comparing this solution with other alternative solutions, White and Summers have said:

> "This outcome favors neither party. But if the buyer-offeror's argument be accepted, the offeror will almost always get his own terms. If on the other hand, the *Roto-Lith* decision be followed, and the second document is not an acceptance or is expressly conditional and therefore cannot 'operate' as an acceptance, the second party will almost always get his own terms because the second document will constitute a counter-offer accepted by performance. We believe that neither of these results is sound. • • • We recognize that the Code may then provide a term substantially identical to one of those rejected. So be it. At least the term so supplied has the merit of being a term that the draftsmen considered fair." J. White and R. Summers, Uniform Commercial Code § 1-2 (1972).

In the present case, the parties' final delivery date of October 15, 1973 and December 15, 1973 cancel out and we must look to I. C. § 28-2-309 (1) to supply the contested term. That section provides that the "time for shipment or delivery or any other action under a contract

if not provided in the chapter or agreed upon shall be a reasonable time."

When addressing the issue of reasonability, courts have considered such factors as the nature of the goods to be delivered, the extent of the seller's knowledge of the buyer's intention, transportation conditions, and the nature of the market. J. White and R. Summers, Uniform Commercial Code § 3-5 (1972). In short, in accordance with Comment 1 to I. C. § 28-2-309 they have looked "to what constitutes acceptable commercial conduct in view of the nature, purpose, and circumstances of the action to be taken."

The trial court found that December 15th was a reasonable termination date. The record includes evidence that supports this conclusion. Southern Idaho had to haul steel pipe from California to Idaho, the pipe was being unearthed over a forty-five mile distance, transfer commenced in early September, and 30,000 feet of pipe had to be transported. Cal-Cut knew that Southern Idaho was depending upon a December 15, 1975 termination date as is evidenced by its confirmation letter stating that "we will work it out." We, therefore, adhere to the oft-quoted maxim that findings of the trial court which are supported by substantial and competent evidence will not be disturbed on appeal.

Given a December 15, 1973, termination date, Cal-Cut breached the contract when it declined to make further deliveries before that date. Southern Idaho is entitled to damages. The trial court allowed Southern Idaho to recover loss of profits. Cal-Cut challenges the propriety of that award. We agree with the trial court that

Southern Idaho was entitled to damages for loss of profits.

Idaho Code § 28-2-713 provides in relevant part that the,

> "• • • measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter • • •."

Idaho Code § 28-2-715 includes as the buyer's consequential damages,

> "any loss resulting from general or particular requirements and needs of which the seller at the time of the contract had reason to know and which could not reasonably be prevented by cover or otherwise."

Cal-Cut knew that Southern Idaho was purchasing its used pipe for resale. This much is uncontested; Cal-Cut's only point of contention is that Southern Idaho failed to cover its losses. The trial court found, however, that because of a shortage of steel pipe at the time of the breach plaintiff was unable to minimize its losses by purchasing steel pipe elsewhere. The testimony of an expert witness supports this conclusion. We will not disturb it on appeal.

Idaho Code § 28-2-715 only limits the buyer's right to loss of profits when cover is possible. If substitute goods cannot be purchased by the buyer he is entitled to loss of profits. J. White and R. Summers, Uniform Commercial Code § 10-4 (1972).

Judgment affirmed. Costs to respondent.

McFADDEN, C. J., BISTLINE, J., and DUNLAP, D. J., retired, concur.

SHEPARD, J., concurs in part and dissents in part.

I concur with the opinion of the majority except as it deals with the threshold issue of jurisdiction.

Although the majority opinion fairly states the facts, I deem additional emphasis should be placed on the fact that the entire transaction took place in the state of California, i. e., the actual sale, the delivery of the pipe to respondent and the payment therefor. The only contact by appellant with the state of Idaho was placing a solicitation of business in the mail, telephone conversations between California and Idaho and the mailing of offers and acceptances. Any previous business between Cal-Cut and Idaho residents was evidently conducted in substantially the same fashion.

I am unable to accept the majority's gloss of Akichika v. Kelleher, 96 Idaho 930, 539 P. 2d 283 (1975) vis a vis the instant case. In *Akichika,* this Court affirmed a lower court ruling that no jurisdiction existed because the contacts with Idaho were not sufficient to constitute "transacting business within Idaho." In *Akichika,* the plaintiff advertised in a newspaper having some circulation in Idaho which prompted telephone inquiries between Idaho and Oregon. There, as here, an Idaho resident journeyed into another state and made a purchase which was returned to Idaho. The transfer of title was to take place through an escrow at an Idaho bank and the seller personally entered Idaho and attempted to obtain possession of the vehicle. When that effort failed, he attempted to use Idaho legal machinery to gain possession of the

vehicle. Nevertheless, the Court there held that such activity did not constitute the requisite minimum contacts within the state of Idaho so as to confer jurisdiction. In my judgment *Akichika* cannot be distinguished and should be either followed or overruled in the instant case.

Insofar as the U. S. Supreme Court has stated its opinion in these matters, I believe their decisions do not speak with the clarity found by the majority opinion. In International Shoe Co. v. Washington, 326 U. S. 310 (1945), the Court did indeed state as quoted by the majority opinion here. There, however, during the three year period of time under scrutiny, International Shoe employed 11 resident salesmen in Washington whose activities were confined to that state and consisted of exhibiting samples and renting rooms in hotels or other buildings. International Shoe shipped its merchandise F. O. B. into the state of Washington. The Court there held that such a course of business within the state constituted a sufficient doing of business to render International amenable to the tax laws of Washington. Compare, however, American Oil Co. v. Neal, 380 U. S. 451 (1965) wherein the Court held a sufficient nexus did not exist between the seller of petroleum products and the state of Idaho to validate a tax on petroleum products sought to be imposed by the state of Idaho. That result obtained albeit millions of gallons of American's petroleum products were delivered by common carrier into the state of Idaho and thereafter used to power common carrier vehicles over the highways of the state of Idaho.

I must concede the existence of McGee v. International Life Ins. Co., 355 U. S. 220 (1974). The only explanation which I can draw from the terse, non-ration-

alized opinion of the Court in *McGee* is that if one is faced with an action involving an insurance carrier "that's different."

It is my belief that if the U. S. Supreme Court were faced with the facts of the instant case, it would hold that the standard of minimal contacts with the state of Idaho has not been met and that the jurisdiction of the Idaho courts should be denied.

HEPWORTH, NUNGESTER & FELTON
1020 Main, Buhl, Idaho 83316
Tel. No. 208-543-4368
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

Civil No. 26952

SOUTHERN IDAHO PIPE & STEEL CO.,

Plaintiff,

vs.

CAL-CUT PIPE & SUPPLY, INC., dba Western Pipe & Tube Co.,

Defendant.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant's Motion to Amend Findings of Fact and Conclusions of Law having come on regularly for hearing on the 14th day of May, 1976, and oral argument having been heard by attorney for plaintiff and attorney for

defendant, it is hereby ordered that Findings of Facts and Conclusions of Law are hereby amended as follows:

FINDINGS OF FACT

I.

That Southern Idaho Pipe & Steel, hereinafter referred to as "Southern Idaho" is an Idaho corporation doing business in Twin Falls, Idaho. That said business consists of, among other things, buying and selling new and used steel pipe.

II.

That the defendant, Cal-Cut Pipe & Supply, Inc., hereinafter referred to as "Cal-Cut" is a foreign corporation, engaged in the business of buying and selling used steel pipe.

III.

That this Court has jurisdiction over the subject matter of this action by virtue of Section 5-514 of the Idaho Code since defendant, Cal-Cut, by contracting with various individuals and corporations within the State of Idaho for the sale of steel pipe is doing business in the State of Idaho.

IV.

That on or about the 22nd day of June, 1973, the defendant Cal-Cut mailed a written letter or circular (Exhibit "A") to Southern Idaho soliciting the sale of certain used pipe. Said circular was sent through the United States mail. It did not mention a specific sales price or terms of sale.

V.

That in response to this solicitation, on or before August 7, 1973, Southern Idaho Steel, through its manager, Archie Langdon, negotiated with Cal-Cut via telephone, an agreement for the sale and purchase of 40,000/60,000 feet of 20″ O. D. x approx. .281″ Wall, 60′ for a maximum length of used steel pipe at $2.95 per lineal foot, F. O. B. job site.

VI.

That the agreement, reached by telephone, was confirmed by Cal-Cut with a written confirmation (Exhibit "B") dated August 7, 1973, but Cal-Cut *added* to the agreement an ending date of October 15, 1973. Upon receipt of the letter, Archie Langdon, on behalf of Southern Idaho, changed the "ending date" from October 15, 1973, to December 15, 1973, and noted on the writing "Note change in pickup ending date". Exhibit "B" was then sent to Cal-Cut together with a $20,000 deposit.

VII.

Cal-Cut received said written instrument (Exhibit "B") together with the $20,000 check and proceeded to accept the $20,000 check by cashing it.

VIII.

Subsequent to accepting Southern Idaho's $20,000 check, Cutbirth, on behalf of Cal-Cut, telephoned Archie Langdon and requested permission to reduce the minimum number of feet of pipe committed from 40,000 lineal feet to 30,000 lineal feet. Archie Langdon consented to this reduction but reaffirmed the ending date of Decem-

ber 15, 1973. Regarding the ending date, Arlis Cutbirth informed Mr. Langdon that this was no problem and that Southern Idaho could have the time it needed; that they would work it out.

IX.

On or about the same date as the above telephone conversation, Cutbirth, on behalf of Cal-Cut, mailed a letter (Exhibit "C") to Southern Idaho evidencing the reduction of the minimum quantity to 30,000 feet and in the body of the letter shows an ending date of October 15, 1973, but in Arlis Cutbirth's own handwriting added a note to the bottom of the letter saying:

"Archie: We will work it out!!"

X.

That Southern Idaho picked up its first shipment of steel on September 8, 1973, and made twenty (20) shipments between that date and October 5, 1973. That the total amount of steel received was 12,937.30 lineal feet.

XI.

That early in October, 1973, steel prices were spiraling upward and Arlis Cutbirth, President of Cal-Cut, informed Archie Langdon of Southern Idaho, that Cal-Cut would not be able to make any further delivery of steel to Southern Idaho at the contract price of $2.95.

XII.

That Cal-Cut had sufficient steel on hand to deliver the minimum of 30,000 feet.

XIII.

That Cal-Cut knew that Southern Idaho was purchasing the used steel pipe for resale.

XIV.

That because of the rise in the cost of used steel and the general shortage of steel at the time of breach, plaintiff was unable to "cover" the steel not delivered by defendant.

XV.

That the market price for used steel of the type which Southern Idaho had purchased under the contract, at Southern Idaho's yard in Twin Falls, Idaho, was as follows: October, 1973, $5.91; November, 1973, $6.40; December, 1973, $6.40; January, 1974, $6.75; February, 1974, $7.70; March, 1974, $7.90; and April, 1974, $10.25.

XVI.

That had the 17,062.61 lineal feet of steel pipe been delivered to Southern Idaho, it could have been delivered from California to Southern Idaho's yard at Twin Falls, Idaho, for $1.877 per foot.

XVII.

That had Southern Idaho received the undelivered 17,062.61 feet of steel, said steel would have been sold in the following quantities by month:

November-December, 1973	5687.50 feet
January, 1974	5687.50 feet
February, 1974	1896.00 feet
March, 1974	1896.00 feet
April, 1974	1895.61 feet
	17,062.61 feet

XVIII.

That as a result of Cal-Cut's breach of the parties' contract, Southern Idaho suffered damages in the sum of FIFTY-EIGHT THOUSAND, FOUR HUNDRED NINETY-NINE AND 62/100 DOLLARS, ($58,499.62) and is entitled to judgment for said sum against the defendant, Cal-Cut, together with costs incurred herein.

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction of this action under Idaho Code 5-514.

II.

That the parties entered into a legal and binding contract whereby Cal-Cut agreed to sell to Southern Idaho 30,000/60,000 feet of used 20" OD steel pipe x Approx. .281" wall, in 60' maximum lengths at $2.95 per foot with a $20,000 payment being made by Southern Idaho to Cal-Cut before delivery of any pipe.

That the parties did not agree that said pipe had to be picked up by October 15, 1973. That Cal-Cut, by cashing the check for $20,000, submitted by Southern Idaho with Exhibit "B", accepted the amended ending date of December 15, 1973, and in any event I find that December 15, 1973, is a reasonable ending date. That had Cal-Cut not breached the contract by refusing to make deliveries after the early part of October 1973, Southern Idaho would have received at least the minimum footage of 30,000 within a reasonable time after the contract was entered into and in any event prior to December 15, 1973.

III.

That in this transaction, Cal-Cut violated that portion of Section 28-2-103 (1) (b) of the Idaho Code which states as follows:

> " 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

IV.

That the action of Cal-Cut in refusing to deliver Southern Idaho any more steel pipe was a breach of the agreement between Southern Idaho and Cal-Cut.

V.

The breach of said contract caused Southern Idaho to lose a minimum amount of 17,062.61 lineal feet of steel pipe covered by the agreement of sale.

VI.

A person should not benefit or profit from his own wrong.

VII.

Under the facts of this case and Idaho Code 28-2-715, Southern Idaho is entitled to recover incidental and consequential damages including lost profits.

VIII.

The Amended Findings of Fact and Conclusions of Law having not changed the ultimate outcome of the case,

the judgment previously entered in this matter is proper and no new judgment need be entered herein.

Dated: May ____, 1976.

District Judge—Theron W. Ward

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26th day of May, 1976, I served a copy of the foregoing Amended Findings of Fact and Conclusions of Law upon:

Lloyd Webb
Attorney at Law
Bank of Idaho Building
Twin Falls, Idaho 83301

by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to said attorney at the above address.

Wm. L. Nungester

APPENDIX B

5-514. *Acts subjecting persons to jurisdiction of courts of state.*—Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;

In The

Supreme Court of the United States

October Term, 1977

No. 77-862

SOUTHERN IDAHO PIPE & STEEL CO.,

Plaintiff-Respondent,

vs.

CAL-CUT PIPE & SUPPLY, INC., d/b/a Western Pipe & Tube Co.,

Defendant-Appellant.

MOTION TO DISMISS

JOHN C. HEPWORTH
OF HEPWORTH, NUNGESTER & FELTON
P. O. Box 589
Buhl, Idaho 83316

Attorneys for Respondent
Southern Idaho Pipe & Steel Co.

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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OTHER AUTHORITIES

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SOUTHERN IDAHO PIPE & STEEL CO.,
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vs.

CAL-CUT PIPE & SUPPLY, INC., d/b/a Western Pipe & Tube Co.,
Defendant-Appellant.

MOTION TO DISMISS

STATEMENT OF CASE

I. Background

The appellant's Statement of the Case generally sets out the facts as they occurred in this case. However, it does gloss over points which the respondent feels are very important. These points are as follows:

1. The undisputed evidence shows that the defendant had been doing business with the plaintiff by sending flyers directly to the plaintiff for some ten years past. In fact, the flyer which led to the transaction in question was addressed personally to the attention of the plaintiff's manager.

2. The Idaho Supreme Court, based upon the record, in this case, *Southern Idaho Pipe & Steel v. Cal-Cut Pipe,* 98 Idaho 495, 567 P. 2d 1246 (1977), made the following observation at page 1248: "Cal-Cut compensates for its lack of sales personnel in Idaho by sending advertising circulars directly to potential buyers, notifying them of the availability of steel pipe and announcing the terms of the sale." The plaintiff submits that this statement by the Idaho Supreme Court is correct and that it is a logical deduction to be arrived at from the facts of the case.

3. The contract was finally entered into when the plaintiff mailed to the defendant from Idaho, a $20,000 check as down payment upon the order of pipe. This check was on an Idaho bank and was accepted by the defendant.

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REASON FOR DENYING APPEAL

I.

Jurisdiction

Defendant claims that the jurisdiction of the Supreme Court to review the decision of the Idaho Supreme Court by direct appeal is conferred by Title 28, United

States Code, § 1257 (2). The constitutional validity of statutes commonly called Long-Arm Statutes, such as Idaho Code 5-514 (a) which is set forth in Appendix "B" of the Appellant's brief, has been upheld numerous times. This case does not lend itself to being a Federal question of substance not heretofore determined by this Court and under Rule 19 (a) of this Court, the appeal should not be heard.

The question submitted is not substantial. The question of whether or not a state court should have jurisdiction under its so called Long-Arm Statute has already been developed from the cases cited in the Appellant's brief. See *International Shoe Company v. State of Washington, etc.,* 326 U. S. 310, 66 S. Ct. 154 (1945); *Magee v. International Life Insurance Company,* 355 U. S. 220, 78 S. Ct. 199 (1957); *Hanson v. Denckla,* 357 U. S. 235, 78 S. Ct. 1228 (1958). Nothing new or novel is presented in this case.

II.

Due Process and Fair Play

In *International Shoe Company,* supra, the question of jurisdiction was equated to the flexible concept of due process as related to the question of whether or not a foreign defendant should be required to respond to the jurisdiction of the Courts of a foreign state. As stated in the Appellant's brief, the Court found that the concepts of due process when applied to the question of jurisdiction required only that the defendant sought to be brought in before the Courts of the forum:

> ". . . have certain minimum contacts with it (the forum) such that the maintenance of the suit does not

offend 'traditional notions of fair play and substantial justice.'"

In *International Shoe Company,* supra, at page 319 (U. S.), 160 (S. Ct.):

> "Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure."

It is this writer's opinion that in determining whether or not the Idaho Courts have jurisdiction over a foreign corporation which has actively solicited business within the State of Idaho, that the psychology of salesmanship, an item which Cal-Cut would have the Court forget, must be reviewed. The normal steps in making a sale are as follows:

The seller desiring to make a sale, canvasses prospective purchasers. By this process he contacts a number of people in order to find out who is interested in his product. Canvassing can be effectively done by: (a) salesmen who make direct and personal calls within the state; (b) by letter or flyers sent directly to addresses of selected persons or boxholders, setting forth a telephone number or mailing address to be replied to if interested; (c) direct telephone calls to prospective purchasers, this latter method is becoming more and more prevalent with large companies using WATTS lines, in fact, the telephone companies are pushing this type of a business solicitation, pointing out the present energy crises and the increasing costs of transportation for salesmen to make personal calls; (d) newspaper and magazine ads which give a toll free number to call in response to the

advertisement. Cal-Cut is presently pursuing Idaho business in general with this latter approach. See Appendix "A" which is an ad that appeared in the Twin Falls Times News, Twin Falls, Idaho, on March 4, 1977.

Southern Idaho maintains that any one of these activities used to canvass prospective customers qualifies as "transaction of business" under Idaho Code 5-514 (a) which reads:

> "Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of the state as to any cause of action arising from the doing of any of said acts:
>
> (a) *The transaction of any business within this state* which *is* hereby *defined* as the *doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation.*" (Emphasis added.)

As the Idaho Supreme Court stated in its opinion in this case:

> "The language of I. C. § 5-514 (a) is broad. It is designed to provide a forum for in-state residents in a world of increasingly complex commercial transactions. The statute is remedial in nature and should be broadly construed. Doggett v. Electronics Corp. of America, 93 Idaho 26, 454 P. 2d 63 (1969)."

In all of the examples set out above, the original contact was initiated by the seller in canvassing prospective buyers. If the seller had not canvassed the buyer the transaction would never have occurred. It is interesting to note that only one of the four methods of canvassing requires the personal presence of a seller's representative within the buyer's state of residence.

After canvassing the prospects the sellers find out what prospects are interested and what prospects are not interested. We all know that in sales work the salesman figures that if he canvasses so many prospects that so many prospects will be interested and from those interested there is a predictable number who will make a purchase.

It should also be noted that in this case the sale involved a sale of 30,000-60,000 feet of pipe at $2.95 per foot or $88,500. Such a sale is a significant piece of business and did result from Cal-Cut's activity of sending flyers directly to Southern Idaho. It is the realization of pecuniary benefit that subjects the sender of the flyer into Idaho to the jurisdiction of the Idaho Courts.

If a state is going to protect its citizens, as consumers, from fly-by-night operations, which operate outside the state but which offer merchandise for sale through advertising or flyers with toll free telephone numbers, then this Court has no alternative but to uphold the opinion of the Supreme Court of Idaho, which held that whoever actively and directly attempts to make sales to the citizens of Idaho in such a manner are subjecting themselves to the jurisdictions of the Idaho Courts under Idaho's Long-Arm Statute.

Southern Idaho would like to point out to the Court that Appellant wants to disregard the case of *Fulmer v. Sloan's Sporting Goods Co.*, 277 F. Supp. 995 (1967) which the Idaho Supreme Court discussed in its opinion in *Southern Idaho Pipe & Steel v. Cal-Cut Pipe,* supra, as follows:

> "The United States Federal District Court for the Southern District of New York had an opportunity to interpret Idaho's long-arm statute in a diversity action initiated by an Idaho citizen against a New York distributor of guns and ammunition. Fullmer v. Sloan's Sporting Goods Co., 277 F. Supp. 995 (1967). Defendant advertised its products in a magazine of national circulation and sold its products to out-of-state customers by mail order. In holding that the defendant was subject to the jurisdiction of Idaho, the court stated:
>
> 'In advertising its products in magazines of national circulation, which led to the sale here involved, defendant was doing an act for the purpose of realizing pecuniary benefit or attempting to accomplish its business purposes in the State of Idaho, which was sufficient to subject defendant to jurisdiction in Idaho under subdivision (a) of Section 5-514 of the Idaho Code.' 277 F. Supp. at 997.

"Note that the court predicated jurisdiction on the fact that d e f e n d a n t advertised in magazines that enjoyed an Idaho circulation and could be expected to reach Idaho clientele. The Court could have added that defendant also shipped its wares directly to Idaho customers, but it did not. Apparently the Court felt that the *mere solicitation of customers in a magazine of national circulation was sufficient to constitute doing business in Idaho within the meaning of I. C. § 5-514 (a).*"

Following the *Sloan's Sporting Goods Co.* case it is apparent that if an advertisement in a magazine of national circulation is sufficient to invoke jurisdiction then the direct mailing of a flyer to a prospective customer within the State of Idaho would also be sufficient to invoke jurisdiction of the Idaho Courts.

Cal-Cut argues that the Idaho Supreme Court erred in finding the case at bar similar to *Intermountain Business Forms, Inc. v. Shepard Business Forms Co.,* 96 Idaho 538, 531 P. 2d 1183 (1975), and urges that the mere act of sending the flyer to Southern Idaho was not the central part of the sales transaction as Southern Idaho was under no obligation to reply to the flyer. Conversely, if Cal-Cut did not want to be subject to the jurisdiction of the Courts of the State of Idaho, it should not have sent a flyer directly to an Idaho business. The flyer is what initiated the transaction, it was used to canvass prospective purchasers and by sending it to Idaho, Cal-Cut subjected itself to jurisdiction in the State of Idaho. Had the flyer not been sent, but had Southern Idaho initiated the transaction by calling Cal-Cut to inquire as to whether or not certain merchandise was available for sale, it would have been Southern Idaho who initiated the sale and there would be no jurisdiction in Idaho over Cal-Cut. Such is not the case however.

Cal-Cut questions the Idaho Supreme Court distinguishing the case of *Akichika v. Kellerher,* 96 Idaho 390, 539 P. 2d 283 (1975) from the case at bar. It is interesting to note that Justice Shepard wrote a dissent in the *Akichika* case and then wrote a dissent in the case at bar stating that if the *Akichika* case was proper then the

majority had erred in the case at bar. It is Southern Idaho's opinion that the *Akichika* case is distinguishable from the case at bar in two respects. First, the written advertisement was placed in the Portland Oregonian which is published in Portland with general circulation in the Oregon area. Had the ad originally been placed in the Boise Statesman in Boise, Idaho, or had a direct letter been sent to the purchaser who lived in Idaho, I am sure that the Court would have had no problem finding that this state had jurisdiction of the action. Second, Akichika went to Oregon and purchased the truck. In the case at bar the contract was entered into as a result of telephone conversations and correspondence between the two parties with Southern Idaho being in Idaho and Cal-Cut being in California. The final signing of the purchase order was by Southern Idaho in Idaho. In the case at bar, the flyer which initiated the sale was sent directly by Cal-Cut to Southern Idaho personally addressed to Archie Langdon. Mr. Langdon was not a person who picked up a newspaper in an airport out of the general circulation area of the newspaper and read an ad. Mr. Langdon was the person to whom the flyer was originally sent. This fact in and of itself distinguishes the case at bar from the *Akichika* case.

The Appellant in addressing itself to the question of due process and fair play found fault with the decision of the Idaho Supreme Court which held that the requirement of due process has been met in the case at bar. In discussing this matter we should point out the language of the Court in *Colony Press, Inc. v. Fleeman,* 308 N. E. 2d 78 (Ill. App. 1974) wherein the Court said:

"It must be noted that 'traditional notions of fair play and substantial justice' is an elastic phrase that necessarily varies with the relationship and situation of the parties."

As such, traditional notions of fair play and substantial justice change with the passage of time. What might not have been fair play 30, 20, 10 or even 5 years ago might well be fair play today. This is particularly so in the present commercial age where WATTS lines are repeatedly used for the transaction of business between parties who are residents of different states.

Since Cal-Cut initiated the business activity by sending the flyer to Southern Idaho, Southern Idaho believes that the Idaho Supreme Court's opinion on the question of due process in this case is correct. In it the Court stated at page 1250 of 576 P. 2d:

"On a purely quantitative basis the contacts in *Hanson* may have been as great as those in *McGee*. The crucial distinction between the two cases seems to be that in *McGee* the contacts, such as they were, were initiated by the defendant where as in *Hanson* they were not.

> 'The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each one that there be some act by which defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*' Hanson v. Denckla, supra at 253. (Emphasis added.)

"We believe that Cal-Cut's initiation of business activity in Idaho is crucial to the resolution of the constitutional question. Unilateral activity usually will not be sufficient to establish the 'minimal contacts' with the forum state envisioned by *International Shoe,* but when a nonresident defendant initiates contact with residents of the forum state and those contacts proceed, we think the constitutional standard of *International Shoe* is satisfied. Cal-Cut has transacted business in Idaho for several years, business that was initiated directly by Cal-Cut, its customers receiving personalized invitations to purchase its wares. Under such circumstances, Cal-Cut cannot deny that it has a sufficient nexus with the state to allow the state's citizens an effective means of legal redress."

As pointed out in *Doggett v. Electronic Corporation of America,* 93 Idaho 26, 454 P. 2d 63 (1969), the Idaho legislature in adopting Idaho Codes 5-514-5-517 intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution.

As pointed out in *Colony Press Inc. v. Fleeman,* supra:

> "in the instant case, defendant should have known that he might be liabe to suit in Illinois if the bill were not paid."

It is apparent that the defendant, Cal-Cut, by actively soliciting business in Idaho to enhance its business purpose or objective knew or should have known that it was subjecting itself to the jurisdiction of the Idaho courts if anything went awry in the contract which developed out of its original contact with the prospective purchaser.

Southern Idaho would like to also point out that Cal-Cut cannot complain that the action could have been filed in California.

In *Tabor & Co. v. McNall,* 30 Ill. App. 3d 593, 333 N. E. 2d 562 (1975), Tabor, doing business in Illinois, contracted to buy a large amount of grain from McNall, a Wisconsin corporation. The contract was negotiated by phone between the Wisconsin office of McNall and the Illinois office of Tabor and confirmed in writings sent from Tabor to McNall.

McNall partially performed and then defaulted. Tabor filed suit in Illinois. Two weeks later McNall filed suit in Wisconsin. McNall filed a limited appearance in Illinois to stop the Illinois action which was denied. Tabor asked Illinois to enjoin McNall from proceeding with the Wisconsin case and an injunction was granted. Tabor also petitioned the Wisconsin Supreme Court to prohibit further action in the Wisconsin case. It was denied. McNall proceeded with the Wisconsin case to verdict.

McNall then appealed the order of the Illinois Court enjoining further action in Wisconsin. The Illinois Appellate Court found that Illinois had jurisdiction under the facts and also that Wisconsin had jurisdiction. The Court then held that the injunction should not have been granted and said:

> "It is not enough that there may be reason to anticipate a difference of opinion between the two courts, and that the courts of a foreign state would arrive at a judgment different from the decisions of the courts in the state of the residence of the parties. (Citation.) It is not inequitable for a party to prosecute a legal demand against another in any forum that will take legal jurisdiction of the case, merely because that forum will afford him a better remedy than that of his domicile. To justify equitable interposition it must be made to appear that an equitable right will otherwise be denied the party seeking relief. (Citation) (Royal League v. Kavanagh, 233 Ill. 175, 183, 84 N. E. 178, 181)".

It is therefore apparent that since Idaho has jurisdiction in this case that Cal-Cut cannot complain that the action could have been brought in California.

CONCLUSION

The decision of the Idaho Supreme Court as it relates to the question of jurisdiction is of fundamental importance to the citizens of Idaho.

The question basically reduces itself to the question, "Is the Court, by its interpretation of the law, going to invite out-of-state con artists to rip-off Idaho citizens?" The Idaho Supreme Court has historically espoused the philosophy of protecting Idaho's consumers and has interpreted the Long-Arm Statute liberally to that end. Indeed, the Idaho Supreme Court has oft times said that Idaho's statute was as liberal as that of any of our sister states. If that policy is to persist, as it certainly should, then the decision in this case must be affirmed.

The case of *Fullmer v. Sloan's Sporting Goods, Co.,* 277 F. Supp. 995, compels the conclusion that Idaho has jurisdiction under the admitted facts of this case. In *Fullmer v. Sloan,* supra, a foreign corporation by advertising products in a magazine of national circulation and selling such products to residents of Idaho by mail order subjected itself to Idaho jurisdiction under Idaho Code

5-514. This case in and of itself is sufficient to support the Idaho Supreme Court's opinion.

Should this Court reverse the decision of the Idaho Supreme Court they will be opening Pandora's box to allow all sorts of "rip-offs" of Idaho citizens by foreign merchandisers. What would result the next time a company such as Cal-Cut breaches a contract with an Idaho corporation? In view of the Cal-Cut advertisement which recently appeared in the Twin Falls, Idaho, Times-News, a copy of which is attached hereto as Appendix "A", it would seem that Cal-Cut would again argue that their advertisement was merely just a flyer; that the proposed purchaser, by calling the toll free WATTS line initiated the sale; and that the purchaser would have to come to California to sue Cal-Cut if they did not deliver.

It takes no imagination to assume a sales scheme, which might be out of a distant state, where the sale of an item for less than $100 would be made by a flyer being sent which asked the buyer to order by telephone. If a suit arose over the sales transaction, the Idaho citizen should not have to go to the distant state to collect his damages but should be allowed to bring suit in the State of Idaho.

In cases such as the one at bar, where a foreign corporation actively seeks the business of an Idaho citizen, by contacting the Idaho citizen within the State of Idaho, the Idaho citizen has the right under Idaho Code 5-514 to bring suit within the State of Idaho. Such a suit does not violate any traditional notions of fair play and justice. To hold otherwise would violate the rights of the consumer. The seller is in a better position to cover the cost

of litigation by going to the State where he solicited business. The seller submitted itself to the jurisdiction of the Idaho Courts by contacting a buyer located within the State of Idaho.

Dated January 9, 1978.

Respectfully submitted,

HEPWORTH, NUNGESTER & FELTON
By JOHN C. HEPWORTH

Attorneys for Respondent

APPENDIX "A"

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